

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

GARY RICHARD LAWMAN,
Plaintiff,

v.

CITY AND COUNTY OF SAN
FRANCISCO, et al.,
Defendants.

Case No. [15-cv-01202-DMR](#)

**ORDER ON DEFENDANTS' MOTION
FOR SUMMARY JUDGMENT AND
PLAINTIFF'S MOTION TO AMEND
THE COMPLAINT**

Re: Dkt. Nos. 38, 69

Plaintiff Gary Richard Lawman, through his guardian ad litem Richard de Villiers, filed this civil rights action under 42 U.S.C. § 1983, the Americans with Disabilities Act (“ADA”), and state law claiming that he suffered injuries following a December 2011 arrest. He asserts claims against the City and County of San Francisco (“CCSF”); San Francisco Police Chief Greg Suhr; San Francisco Police Department (“SFPD”) Officers Phillip M. Gordon, Glen Paul Minioza, Brian W. Kneuker, Sgt. Carlos Gutierrez, and Sgt. Craig F. Tom; San Francisco Sheriff’s Department (“SFSD”) Deputies Patrick F. Pene, Julio C. Palencia, Andrew N. Brown, Senior Deputy Paul E. Rapicavoli, and Sgt. Matthew M. O’Shea; CCSF Sheriff Michael Hennessey; and CCSF Nurses Roel L. Lapitan and Frank Latko.

Before the court are Defendants’ motion for summary judgment and Plaintiff’s motion for leave to amend the complaint. [Docket Nos. 38 (Defs.’ Mot. for Summ J.); 69 (Pl.’s Supp. Brief), 70 (Defs.’ Supp. Brief).] The court conducted a hearing on December 17, 2015 and ordered the parties to submit supplemental briefing. Having considered the parties’ argument and submissions, and for the reasons stated below, Defendants’ motion is GRANTED IN PART AND DENIED IN PART. Plaintiff’s motion for leave to amend is DENIED.

I. BACKGROUND

A. Factual Background

The facts recounted below are undisputed, unless otherwise noted.

1. Lawman's Arrest, Incarceration, and Release

Plaintiff Gary Lawman was in San Francisco on the night of December 31, 2011.

Sometime after 9:00 p.m., Lawman entered the Four Seasons Hotel on Market Street in order to gain access to the Four Seasons Residences. He attempted to board secure elevators that can only be operated with a key or fob. Concierge John Rodie asked if he could help Lawman, who responded that he needed to "get to the penthouse." Even though Lawman could not identify a specific penthouse or resident, he repeatedly insisted that Rodie send him up to the top penthouse. Rodie refused to allow him to use the elevator without more information. According to Rodie, Lawman was casually dressed and "pretty clean-cut," and his demeanor was "cocky; kind of sarcastic." Lawman eventually sat down on a bench by the elevators. After a short time, he approached Rodie at his desk to ask him for a bottle of water. When Rodie offered him one, Lawman said that he wanted Rodie to serve him the bottle on a silver platter. At that point, Rodie called security since Lawman was refusing to answer his questions and "had no business there."

Rodie, who came within two to three feet of Lawman, did not smell alcohol on him and did not believe he was drunk. According to Rodie, Lawman was steady on his feet and was speaking clearly and at a normal pace. His eyes were not bloodshot, his eyelids were not drooping or heavy, and he was not sweating. However, given Lawman's behavior, Rodie thought he might be under the influence of narcotics.

Security guard John Flores responded to Rodie's call. According to Flores, Lawman was rude and acting "kind of weird," and refused to leave. Flores asked Lawman if he was visiting a resident. Lawman denied that he was visiting a resident and told Flores words to the effect of "You don't belong here. Get out of here." Lawman then told Flores to get him a cup of water. Flores, who receives periodic training on how to detect intoxication and deal with intoxicated hotel guests, did not believe that Lawman was drunk. He came within five to eight feet of Lawman and did not smell alcohol on him. He did not observe Lawman stumbling, sweating, or

1 slurring his speech. He also denied that Lawman had bloodshot eyes or heavy eyelids. Flores
2 soon called the police for assistance with removing Lawman from the premises. He did not tell
3 the police that Lawman was intoxicated.

4 SFPD officers, including Defendants Gordon and Minioza, were dispatched to the Four
5 Seasons at approximately 9:20 p.m. When they arrived, Flores explained to the officers that
6 Lawman had no business there and was refusing to leave. The officers did not ask Flores any
7 questions before speaking directly to Lawman. They did not speak with Rodie at all. According
8 to Flores, one of the officers asked Lawman what he was doing there, and asked Lawman to get up
9 and leave. Flores does not recall any of Lawman's specific statements to the officers, but
10 described Lawman as rude. Similarly, Rodie described Lawman's behavior toward the officers as
11 belligerent. The officers lifted Lawman to his feet and walked him out of the building to a police
12 van parked a few hundred feet away. Flores observed that Lawman walked steadily the whole
13 way.

14 Gordon arrested Lawman for public intoxication in violation of California Penal Code
15 section 647(f). Officers are not required to prepare a police incident report if arresting an
16 individual for public intoxication. Instead, they fill out a Public Intoxication Report, which
17 appears to be a 5" by 7" card which contains boxes for capturing basic information, "check off"
18 boxes for the officer's physical observations, and a small area in which the officer can provide a
19 brief narrative description. *See, e.g.,* Bers Decl. Ex. D (Public Intoxication Report). Gordon
20 completed a Public Intoxication Report for Lawman's arrest, and signed it under oath. Gordon
21 checked boxes indicating that Lawman exhibited a flushed face, drooping eyelids, slow and
22 slurred speech, and a moderate odor of alcohol. Bers Decl. Ex. D. Gordon also handwrote the
23 following observations:

24 I was dispatched to 757 Market St regarding an intoxicated
25 trespasser. I contacted Richard [sic] Lawman. Lawman refused to
26 leave. He smelled heavily of alcoholic beverage and could not
answer my questions. I determined Lawman was unable to care for
himself as a result of his intoxication.

27 *Id.* Gordon obtained approval for the arrest from Defendant Tom, but it is not clear whether Tom
28 personally observed Lawman. Defendant Kneuker transported Lawman to County Jail 1 as a

1 “release when sober,” which is a four-hour minimum detention in a sobering cell. Gordon has
2 only a vague memory of the entire incident, and Minioza and Kneuker have no recollection of the
3 incident at all.

4 Upon Lawman’s arrival at County Jail 1, Defendant Latko, a nurse, performed a triage
5 assessment. Latko completed a triage report indicating that Lawman’s general appearance was
6 unremarkable and noting that Lawman stated that he “has no urgent medical condition.” Bers
7 Decl. Ex. J. Latko also determined that Lawman was not suicidal and was not using drugs. Latko
8 did not perform a physical or mental examination. Lawman was then placed in a sobering cell,
9 where he was observed by nursing staff and deputies four times per hour. May Decl. Ex. 15 at
10 CCSF_LAWMAN 000012 (Sobering Cell Observation Record). Lawman’s observation record
11 indicates that jail personnel checked on him eleven times over a four hour period, in
12 approximately fifteen minute intervals. The observation record contains no entries of unusual
13 behavior. *Id.* One of Lawman’s sobering cell mates, M. M.,¹ recalls that Lawman was “dressed
14 nicely but had peanut butter smeared on him.” He states that Lawman “was acting loopy and
15 restless,” but M. M. did not observe signs that Lawman was “under the influence of alcohol, such
16 as slurred speech, bloodshot eyes, droopy eyelids, or smell of alcohol.” M. M. Decl., Nov. 19,
17 2015, ¶ 5.²

18 The jail discharged Lawman at 1:40 a.m. on January 1, 2012. About fourteen hours later,
19 at approximately 3:15 p.m., Flores observed Lawman walking down Market Street in front of the
20 Four Seasons without a shirt or shoes. Witnesses later saw Lawman walking shirtless and
21 shoeless in lanes of traffic on Highway 80 going eastbound; one reported that he appeared “not all
22 there.” May Decl. Ex. 15 at CCSF_LAWMAN 000023-33 (Traffic Collision Report). At
23

24 ¹ The court uses initials instead of full names where privacy rights are implicated, and where the
25 use of a full name is not relevant to the dispute.

26 ² Defendants object to the portion of M. M.’s declaration in which he offers his opinion that
27 Lawman was “either mentally ill or on drugs” as improper lay opinion “without any description of
28 behavior that would support a reasonable inference that plaintiff required immediate medical
care.” Reply at 12 n.14. Defendants’ objection is overruled as moot, since the court does not rely
on that portion of M. M.’s declaration in reaching its opinion.

approximately 10:55 p.m., a pickup truck traveling 40-50 miles per hour struck Lawman, who suffered multiple injuries, including severe traumatic brain injury. Traffic Collision Report at 32; Katz Decl., June 4, 2014, ¶¶ 4, 7.

Lawman's injuries affected his short term memory. His only memory of the events at the Four Seasons is a vague recollection of being in a hotel, near an escalator. Although he remembers being in a jail cell, he has no memory of being arrested, handcuffed, or questioned at the jail.

2. Lawman's Condition

In his declaration, medical expert Bruce S. Victor, M.D., opines that Lawman has "longstanding bipolar disorder." According to Dr. Victor, Lawman was experiencing a manic episode from December 31, 2011 through January 1, 2012, and was not experiencing alcohol intoxication. Victor Decl. Nov. 20, 2015, ¶¶ 3-4, 6.³ Although Defendants do not object to this portion of Dr. Victor's opinion, they counter that psychotherapist Harry Motro, Psy.D., who treated Lawman for one year prior to the incident, never observed Lawman display symptoms of bipolar disorder during treatment. Lawman had disclosed to Dr. Motro that he had previously received a diagnosis of bipolar disorder, and that Lawman disagreed with that diagnosis. Dr. Motro diagnosed Lawman with adjustment disorder.

B. Procedural History

Lawman filed his complaint on December 31, 2013 in San Francisco Superior Court, and successfully moved for appointment of a guardian ad litem. Defendants removed the action to this court on March 13, 2015. In his first amended complaint, Lawman alleges the following causes of action: 1) 42 U.S.C. § 1983 ("section 1983") claim for wrongful arrest based on the Fourth Amendment against Gordon, Minioza, Kneuker, Gutierrez, and Tom; 2) section 1983 claim for deliberate indifference based on the Fourteenth Amendment against Pene, Palencia, Brown, Rapicavoli, O'Shea, Lapitan, and Latko; 3) section 1983 claim for municipal liability against

³ Defendants object to portions of Dr. Victor's declaration. However, Defendants do not object to Dr. Victor's opinion that Lawman has bipolar disorder and was experiencing a manic episode on the dates in question. See Reply at 5 n.6.

CCSF, Suhr, and Hennessey; 4) violation of the Americans with Disabilities Act (“ADA”), 42 U.S.C. § 12132, against all Defendants; 5) violation of California Government Code section 845.6 against all Defendants; 6) violation of California’s Bane Act, California Civil Code section 52.1 against all Defendants; 7) negligence against all Defendants; and 8) false arrest/imprisonment against all Defendants. [Docket No. 1-25.]

In his opposition to Defendants’ motion for summary judgment, Plaintiff requested leave to amend his complaint to allege a section 1983 claim for failure to render medical care based on the Fourth Amendment. At the December 17, 2015 hearing, the court ordered the parties to submit supplemental briefing on Plaintiff’s motion to amend, which the parties timely filed.

II. MOTION FOR SUMMARY JUDGMENT

A. Legal Standards

A court shall grant summary judgment “if . . . there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a). The burden of establishing the absence of a genuine issue of material fact lies with the moving party, *see Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986), and the court must view the evidence in the light most favorable to the non-movant. *See Scott v. Harris*, 550 U.S. 372, 378 (2007) (citation omitted). A genuine factual issue exists if, taking into account the burdens of production and proof that would be required at trial, sufficient evidence favors the non-movant such that a reasonable jury could return a verdict in that party’s favor. *Anderson v. Libby Lobby, Inc.*, 477 U.S. 242, 248. The court may not weigh the evidence, assess the credibility of witnesses, or resolve issues of fact. *See id.* at 249.

To defeat summary judgment once the moving party has met its burden, the nonmoving party may not simply rely on the pleadings, but must produce significant probative evidence, by affidavit or as otherwise provided by Federal Rule of Civil Procedure 56, supporting the claim that a genuine issue of material fact exists. *TW Elec. Serv., Inc. v. Pac. Elec. Contractors Ass’n*, 809 F.2d 626, 630 (9th Cir. 1987) (citations omitted). In other words, there must exist more than “a scintilla of evidence” to support the non-moving party’s claims, *Anderson*, 477 U.S. at 252; conclusory assertions will not suffice. *See Thornhill Publ’g Co. v. GTE Corp.*, 594 F.2d 730, 738

(9th Cir. 1979). Similarly, “[w]hen opposing parties tell two different stories, one of which is blatantly contradicted by the record, so that no reasonable jury could believe it, a court should not adopt that version of the facts” when ruling on the motion. *Scott*, 550 U.S. at 380.

B. Analysis

1. Claims and Defendants No Longer at Issue

In his opposition, Lawman concedes his Fourteenth Amendment deliberate indifference claim, section 845.6 claim against Gordon and Minioza, and all claims against Latko and Lapitan. These claims are accordingly dismissed with prejudice. Lawman also concedes that his ADA claim is properly asserted only against CCSF, and not the individual defendants. Therefore, his ADA claim as to all of the individual defendants is dismissed with prejudice.

In his opposition, Lawman failed to provide any evidence of the involvement of Sheriff Hennessey, Chief Suhr, Sergeant Gutierrez, or Sergeant Tom, and does not appear to oppose Defendants’ motion for summary judgment as to those individuals. Accordingly, summary judgment is granted as to all claims against them.

2. Wrongful Arrest

Defendants move for summary judgment on Lawman’s claims for unlawful arrest and false arrest/false imprisonment on the grounds that probable cause supported his arrest. In the alternative, they argue that they are entitled to qualified immunity.

a. Whether Lawman’s Arrest Was Supported by Probable Cause

“Under the Fourth Amendment, a warrantless arrest requires probable cause.” *United States v. Lopez*, 482 F.3d 1067, 1072 (9th Cir. 2007) (citing *Michigan v. Summers*, 452 U.S. 692, 700 (1981)). “Probable cause exists when officers have knowledge or reasonably trustworthy information sufficient to lead a person of reasonable caution to believe that an offense has been or is being committed by the person being arrested.” *Id.* (citing *Beck v. Ohio*, 379 U.S. 89, 91 (1964)). “Alternatively, this court has defined probable cause as follows: when ‘under the totality of circumstances known to the arresting officers, a prudent person would have concluded that there was a fair probability that [the defendant] had committed a crime.’” *Id.* (citing *United States v. Smith*, 790 F.2d 789, 792 (9th Cir. 1986)) (alteration in original). While conclusive evidence of

1 guilt is not necessary under this standard to establish probable cause, “[m]ere suspicion, common
2 rumor, or even strong reason to suspect are not enough.” *McKenzie v. Lamb*, 738 F.2d 1005, 1008
3 (9th Cir. 1984) (citing *Henry v. United States*, 361 U.S. 98, 101 (1959)). “Probable cause is
4 lacking if the circumstances relied on are susceptible to a variety of credible interpretations not
5 necessarily compatible with nefarious activities.” *Gasho v. United States*, 39 F.3d 1420, 1432 (9th
6 Cir. 1994) (citations omitted).

7 “Probable cause must be determined at the time the arrest is made. Facts learned or
8 evidence obtained as a result of a stop or arrest cannot be used to support probable cause unless
9 they were known to the officer at the moment the arrest was made.” *Allen v. City of Portland*, 73
10 F.3d 232, 236 (9th Cir. 1995) (citing *Wong Sun v. United States*, 371 U.S. 471, 482 (1963)).
11 “Where the facts or circumstances surrounding an individual’s arrest are disputed, the existence of
12 probable cause is a question for the jury.” *Harper v. City of Los Angeles*, 533 F.3d 1010, 1022
13 (9th Cir. 2008) (citing *McKenzie*, 738 F.2d at 1008).

14 Defendants argue that probable cause existed to arrest Lawman for trespassing under
15 California Penal Code section 602.1(a) and/or section 602(o), as well as public intoxication under
16 Penal Code section 647(f).

17 **i. Trespassing**

18 Lawman argues that Defendants should not be permitted to seek summary judgment based
19 on a trespassing theory of arrest. He asserts that he conducted virtually no discovery on that
20 theory, because Defendants did not identify trespassing in their interrogatory response when asked
21 to state all facts supporting their contention that Defendants had probable cause to arrest Lawman.
22 *See* May Decl. Ex. 1 (response to interrogatory 3); Ex. 20 (letter to defense counsel requesting
23 supplementation of discovery responses). Instead of providing a narrative response to the
24 interrogatory, Defendants simply referred to a number of documents, including a Computer Aided
25 Dispatch (“CAD”) related to Lawman’s arrest and the Public Intoxication Report. Defendants
26 argue that the Public Intoxication Report refers to Lawman as “an intoxicated trespasser,” and that
27 the CAD uses “code 602”, which denotes “trespass.” Accordingly, Defendants contend that
28 Lawman cannot claim unfair surprise.

The court disagrees. Federal Rule of Civil Procedure 33 governs interrogatories, and provides that “[e]ach interrogatory must, to the extent it is not objected to, be answered separately and fully in writing under oath.” Fed. R. Civ. P. 33(b)(3). An answer to an interrogatory should be complete in itself:

[A]n answer to an interrogatory must be responsive to the question. It should be complete in itself and should not refer to the pleadings, or to depositions or other documents, or to other interrogatories, at least where such references make it impossible to determine whether an adequate answer has been given without an elaborate comparison of answers.

Scaife v. Boenne, 191 F.R.D. 590, 594 (N.D. Ind. 2000) (citations omitted). “Incorporation by reference is not a responsive answer.” *Id.* (quoting *Cont’l Ill. Nat. Bank & Trust Co. of Chicago v. Caton*, 136 F.R.D. 682, 686 (D. Kan. 1991)). A party’s interrogatory response may refer to business records or abstracts only “if the burden of deriving or ascertaining the answer will be substantially the same for either party.” Fed. R. Civ. P. 33(d). Here, Defendants’ interrogatory response listing various documents was not proper under Rule 33(d).

Moreover, the documents identified in the interrogatory response failed to put Lawman on notice of Defendants’ trespass theory. The Public Intoxication Report is the SFPD’s official record supporting Lawman’s arrest for violating Penal Code section 647(f). It cannot be used to document an arrest for trespass, and it does not contain any facts about trespassing. As to the CAD, the court cannot find a reference to code “602,” and there is no record evidence to support Defendants’ claim that “602” is the SFPD code to denote a suspected trespass. Defendants offer no other evidence to demonstrate that Lawman had notice of their trespass theory prior to the filing of their summary judgment motion. Had Defendants properly responded to the interrogatory with a narrative that identified their trespass theory, Plaintiff would have understood their position and could have taken appropriate follow-up discovery. Since Defendants’ improper discovery response did not put Lawman on notice of that contention, the court declines to consider Defendants’ arguments on trespassing and denies Defendants’ motion for summary judgment motion as to that theory.

ii. Public Intoxication

1 California Penal Code section 647(f) provides that a person who engages in the following
2 conduct is “guilty of disorderly conduct, a misdemeanor”:

3 [w]ho is found in any public place under the influence of
4 intoxicating liquor, any drug, controlled substance, toluene, or any
5 combination of any intoxicating liquor, drug, controlled substance,
or toluene, in a condition that he or she is unable to exercise care for
his or her own safety or the safety of others . . .

6 Cal. Pen. Code § 647(f). Defendants argue that under the totality of the circumstances, a
7 reasonable officer could have concluded that Lawman was intoxicated in public. They point to the
8 Public Intoxication Report in which Gordon wrote that Lawman “smelled heavily of alcoholic
9 beverage” and indicated that Lawman had a flushed face, drooping eyelids, and slow and slurred
10 speech.

11 Viewing the evidence in the light most favorable to Lawman, the court finds that a
12 reasonable jury could conclude that Gordon lacked probable cause to arrest Lawman for public
13 intoxication. Gordon’s observations and statements in the Public Intoxication Report are directly
14 contradicted by Rodie and Flores, the two witnesses who observed Lawman immediately before
15 the police arrived. Specifically, Rodie testified that Lawman’s eyes were not bloodshot, his
16 eyelids were not drooping or heavy, and he spoke clearly and at a normal pace. Flores also denied
17 that Lawman had bloodshot eyes or heavy eyelids, and did not observe Lawman slurring his
18 speech. Both witnesses were in relatively close proximity to Lawman, and neither smelled alcohol
19 on Lawman.⁴ Both witnesses, including Flores, who received training on how to detect
20 intoxication, did not believe that Lawman was drunk. Given the genuine dispute of material facts
21 regarding Lawman’s appearance and comportment, a jury must decide whether the arrest for
22 public intoxication was supported by probable cause.⁵

23 _____
24 ⁴ Defendants state that only Rodie testified that he did not smell alcohol on Lawman. This is
inaccurate. Flores also testified “I didn’t smell any alcohol.” Flores Dep. 30.

25 ⁵ Defendants argue that circumstantial evidence of Lawman’s history of alcohol abuse supports the
26 conclusion that Lawman was drunk. Mot. at 5 n.1. This evidence does not counteract the facts
27 elicited from percipient witnesses suggesting that Lawman was not intoxicated on the night in
question. Defendants also argue that Lawman’s testimony that he has not been drunk since he was
28 17 years old runs contrary to treatment records that indicate that he had a problem with alcohol.
Lawman objects to these records as inadmissible hearsay and character evidence under Federal
Rule of Evidence 404(b). The purpose for which Defendants offer this evidence is not clear, and

In their reply brief, Defendants claim for the first time that probable cause existed to arrest Lawman for being under the influence of narcotics or drugs. Reply at 1. In their opening brief, Defendants referred only to alcohol in their discussion of probable cause supporting public intoxication. *See* Mot. at 9-10; *see also* Mot. at 5 n.1 (“the circumstantial evidence fully supports Plaintiff’s being drunk.”). The court will not consider arguments raised for the first time on reply. The court notes, however, that the Public Intoxication Report form specifically states that it is “not to be used for drug intoxication arrests.” Bers Decl. Ex. D.

b. Qualified Immunity

Defendants also move for summary judgment on Lawman’s wrongful arrest claim on the grounds that they are entitled to qualified immunity.

The doctrine of qualified immunity protects government officials “from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.” *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). The analysis involves two inquiries. First, taken in the light most favorable to the plaintiff, the court must ask whether the facts alleged show that the officer’s conduct violated a constitutional right. *Saucier v. Katz*, 533 U.S. 194, 201 (2001). If the answer is “no,” then the court need not inquire further before ruling that the officer is entitled to qualified immunity. *Id.* If, however, “a violation could be made out on a favorable view of the parties’ submissions,” the court must examine “whether the [constitutional] right was clearly established.”⁶ *Id.* “The relevant, dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted.” *Brosseau v. Haugen*, 543 U.S. 194, 198-99 (2004) (quoting *Saucier*, 533 U.S. at 202). If the law did not put the officer on notice that his conduct would be clearly unlawful,

the court does not rely on any evidence about his past alcohol use in reaching its opinion. The court therefore denies the objections as moot.

⁶ In *Pearson v. Callahan*, 555 U.S. 223, 236 (2009), the Supreme Court held that a court has the discretion to decide “which of the two prongs of the qualified immunity analysis should be addressed first in light of the circumstances in the particular case at hand.”

summary judgment based on qualified immunity is appropriate. *Saucier*, 533 U.S. at 202.

The Ninth Circuit has made clear that “when [qualified immunity] depends on genuinely disputed issues of material fact, the court must submit the fact-related issues to the jury.” *Ortega v. O’Connor*, 146 F.3d 1149, 1154 (9th Cir. 1998); *see also Torres v. City of Los Angeles*, 548 F.3d 1197, 1211 (9th Cir. 2008) (noting that where “historical facts material to the qualified immunity determination are in dispute,” a jury must decide those facts). “The determination of whether a reasonable officer could have believed his conduct was lawful is a determination of law that can be decided on summary judgment only if the material facts are undisputed.” *LaLonde v. Cnty. of Riverside*, 204 F.3d 947, 953 (citing *Act Up!/Portland v. Bagley*, 988 F.2d 868, 873 (9th Cir. 1993)).

Given the disputed facts regarding Lawman’s appearance and comportment at the time of his arrest, a jury could conclude that Lawman was not intoxicated, but that Gordon recorded inaccurate observations on Lawman’s Public Intoxication Report in order to make an expedient New Year’s Eve arrest, and to avoid having to complete a more time-consuming conventional police incident report. Such actions would obviously violate Lawman’s constitutional rights. Therefore, the court denies summary judgment on qualified immunity on this claim.

3. False Arrest/False Imprisonment

With respect to Lawman’s claim for false arrest/false imprisonment, Defendants argue that California Penal Code section 847(b) immunizes them from liability because the officers had reasonable cause to believe that the arrest was lawful.

Section 847(b) provides that

There shall be no civil liability on the part of, and no cause of action shall arise against, any peace officer or federal criminal investigator or law enforcement officer . . . acting within the scope of his or her authority, for false arrest or false imprisonment arising out of any arrest under any of the following circumstances:

- (1) The arrest was lawful, or the peace officer, at the time of the arrest, had reasonable cause to believe the arrest was lawful.

Cal. Penal Code § 847(b)(1). Like qualified immunity under federal law, the statute immunizes officers from false arrest claims where there is “reasonable cause to believe the arrest was lawful,”

which California courts have defined as existing when “the facts known to the arresting officer would lead a reasonable person to have a strong suspicion of the arrestee’s guilt.” *O’Toole v. Superior Court*, 140 Cal. App. 4th 488, 511 (2006). California courts look to cases decided under the Fourth Amendment to determine whether reasonable cause existed for purposes of section 847. *Levin v. United Airlines*, 158 Cal. App. 4th 1002, 1017 n.18 (2008); *Blankenhorn v. City of Orange*, 485 F.3d 463, 471 (9th Cir. 2007).

As explained above, there are genuine disputes about the underlying facts supporting Lawman’s arrest for public intoxication. Summary judgment on section 847(b) immunity for Lawman’s false arrest/imprisonment claim is therefore denied.

4. *Monell*

Lawman’s third claim is for municipal liability against CCSF pursuant to *Monell v. Department of Social Services*, 436 U.S. 658 (1978).⁷ Lawman alleges that CCSF had an informal policy, practice, and custom of encouraging SFPD officers to arrest individuals for violations of section 647(f) without sufficient evidence of intoxication, as a way of streamlining arrests of citizens and avoiding the preparation of complete and accurate police reports. Am. Compl. ¶ 42. He also alleges that CCSF had an informal policy, practice, and custom of taking individuals into custody who are arrested for public intoxication without performing tests to verify whether the individuals are actually intoxicated and not suffering from a mental health emergency. Am. Compl. ¶ 46.

A municipality may face section 1983 liability if it “‘subjects’ a person to a deprivation of rights or ‘causes’ a person ‘to be subjected’ to such deprivation.” *Connick v. Thompson*, 563 U.S. 51, 60 (2011) (quoting *Monell*, 436 U.S. at 692). However, the municipality may be held liable

⁷ Lawman also pleaded his *Monell* claim against Suhr and Hennessey in their official capacities. As this is redundant of the claim against CCSF, summary judgment is granted as to Lawman’s *Monell* claim against Suhr and Hennessey. See *Kentucky v. Graham*, 473 U.S. 159, 165-66 (1985) (**Error! Main Document Only.** “Official-capacity suits . . . ‘generally represent only another way of pleading an action against an entity of which an officer is an agent. As long as the government entity receives notice and an opportunity to respond, an official-capacity suit is, in all respects other than name, to be treated as a suit against the entity.” (citations omitted)). As noted above, Lawman does not appear to oppose Defendants’ motion for summary judgment against Suhr and Hennessey.

“only for ‘[its] own illegal acts.’” *Id.* (quoting *Pembaur v. Cincinnati*, 475 U.S. 469, 479 (1986)). It cannot be held vicariously liable for its employees’ actions. *Id.* (citations omitted). To establish municipal liability, plaintiffs “must prove that ‘action pursuant to official municipal policy’ caused their injury.” *Id.* (quoting *Monell*, 436 U.S. at 691). “The ‘official policy’ requirement was intended to distinguish acts of the *municipality* from acts of *employees* of the municipality, and thereby make clear that municipal liability is limited to action for which the municipality is actually responsible.” *Pembaur*, 475 U.S. at 479-80. Official municipal policy includes “the decisions of a government’s lawmakers, the acts of its policymaking officials, and practices so persistent and widespread as to practically have the force of law.” *Connick*, 563 U.S. at 61 (citations omitted). Such policy or practice must be a “moving force behind a violation of constitutional rights.” *Dougherty v. City of Covina*, 654 F.3d 892, 900 (9th Cir. 2011) (citing *Monell*, 436 U.S. at 694). An official municipal policy may be either formal or informal. *City of Saint Louis v. Praprotnik*, 485 U.S. 112, 131 (1988) (acknowledging that a plaintiff could show that “a municipality’s actual policies were different from the ones that had been announced.”).

An informal policy exists when a plaintiff can “prove the existence of a widespread practice that, although not authorized by written law or express municipal policy, is so permanent and well settled as to constitute a custom or usage with the force of law.” *Praprotnik*, 485 U.S. at 127 (citation omitted). “Liability for improper custom may not be predicated on isolated or sporadic incidents; it must be founded upon practices of sufficient duration, frequency and consistency that the conduct has become a traditional method of carrying out policy.” *Trevino v. Gates*, 99 F.3d 911, 918 (9th Cir. 1996); *see also Christie v. Iopa*, 176 F.3d 1231, 1235 (9th Cir. 1999) (“A single constitutional deprivation ordinarily is insufficient to establish a longstanding practice or custom.”).

In support of his *Monell* claim, Lawman presents nearly 60 complaints to the Office of Citizen Complaints (“OCC”) over the past five years from citizens alleging they were wrongfully arrested for public intoxication by the SFPD. May Decl. Ex. 15 at CCSF_LAWMAN 000844-907. These documents are in the form of “Complaint Summary Reports.” Bers Decl. Nov. 30, 2015 (“Bers Reply Decl.”) ¶ 5. Lawman has evidence of approximately 57 additional OCC

complaints about wrongful arrests for public intoxication from 2005 to 2010. May Decl. ¶ 22, Ex. 15 at CCSF_LAWMAN 001063-1312 (excerpts of complaints). Only one of these complaints was sustained. Bers Reply Decl. ¶ 8 (*see* CCSF_LAWMAN 000859).

Lawman also points to testimony by Latko, who served as a nurse at County Jail 1 from November 2002 to December 2013. County Jail 1 appears to be CCSF's main facility for detainees placed in sobering cells following an arrest for public intoxication.⁸ Latko testified that it was "not unusual" for him to screen section 647(f) arrestees who did not appear to be drunk. When he notified SFPD officers or deputies of his observations, "they never agreed with [him]." They would "verbally note[]" Latko's observations but "it didn't change anything." When asked about his understanding of section 647(f), Latko testified that he did not believe that it meant that "somebody's so intoxicated they can't care for themselves or others." Instead, he testified that based on his experience, section 647(f) is "more of a behavioral thing," and that the large majority of people arrested for violating section 647(f) appear to be able to care for their own safety.

Lawman also presents evidence that SFPD policy requires that section 647(f) arrestees be given the opportunity to arrange for a blood, breath, or urine test to determine the presence or absence of alcohol at the arrestee's own expense. May Decl. Ex. 15 at CCSF_LAWMAN 000189. However, arrestees booked into the jail are not advised of their right to arrange for a test, and Latko testified that in his 11 years at County Jail 1, he could not remember a single section 647(f) arrestee receiving a breathalyzer test.

In June 2003, in response to citizen complaints, the OCC formally recommended that the SFPD provide preliminary alcohol screening tests to section 647(f) arrestees as a matter of policy. May Decl. Ex. 15 at CCSF_LAWMAN 000063. The SFPD has not adopted this policy. Numerous officers testified that a policy requiring preliminary alcohol screening tests for section

⁸ At his deposition, Sheriff's Deputy Matthew Freeman confirmed that he had been designated Defendants' person most knowledgeable "regarding the use and operation of sobering cells." In response to the question, "is it safe to assume that we are talking about knowledge of sobering cells at [County Jail 1]?" he responded in the affirmative. Freeman Dep. at 8. Therefore, it is reasonable to infer that County Jail 1 is CCSF's primary facility for detaining individuals arrested for violating section 647(f).

647(f) arrestees would not interfere with law enforcement officers' performance of their jobs.⁹

Lawman argues that this evidence, taken together, shows "systematic wrongful public intoxication arrests in San Francisco." Opp'n at 19. He further contends that CCSF's deliberate indifference is evidenced by its failure to adopt the OCC's recommendation that preliminary alcohol screening tests be given to section 647(f) arrestees.

Defendants argue that the evidence of over 100 complaints to the OCC regarding wrongful arrests for public intoxication is not probative of the existence of an improper or unlawful custom, because Lawman fails to provide any evidence that the number of complaints is unusually high. They argue that under Ninth Circuit law, "[c]onsistent with the commonly understood meaning of custom, proof of random acts or isolated events are insufficient to establish custom" for purposes of *Monell* liability. *Thompson v. City of Los Angeles*, 885 F.2d 1439, 1443-44 (9th Cir. 1989), *overruled on other grounds by Bull v. City & Cty. of San Francisco*, 595 F.3d 964 (9th Cir. 2010) (citations omitted). They also assert that Lawman provides no information about the total number of arrests for violation of section 647(f) from which the court could conclude that the number of complaints is high in proportion to the total number of arrests, citing a Sixth Circuit case, *Thomas v. City of Chattanooga*, 398 F.3d 426, 431 (6th Cir. 2005). In *Thomas*, the Sixth Circuit affirmed summary judgment on a *Monell* claim alleging the existence of an informal police department practice of condoning the use of excessive force by its officers. The plaintiffs relied on testimony from an expert who opined that such a practice existed in Chattanooga. However, his opinion was largely based on the number of "formal civil cases alleging use of excessive force by police officers" in the city. *Id.* at 430. The court held that the expert "failed to explain how one could

⁹ Lawman also submits the declaration of David A. Dusenbury, his police practices expert, who opines that section 647(f) arrestees should be advised of their right to a test to determine the presence or absence of alcohol, and that SFPD officers "systematically abuse Penal Code section 647(f)." Dusenbury Decl., Nov. 20, 2015 ¶¶ 8, 9. Defendants object to the Dusenbury declaration pursuant to Federal Rule of Evidence 702, arguing that his opinions are not based on reliable principles and methods. The court denies this objection as moot as it does not consider the Dusenbury declaration in reaching its decision.

The court denies all remaining evidentiary objections as moot, since it did not rely on any of the evidence to which the parties objected in reaching its decision.

1 evaluate the mere number of complaints in a vacuum to come to a conclusion about the
2 Department's policies," and did not "compare or contrast the number of excessive force
3 complaints made by citizens of Chattanooga with the number of excessive force complaints in
4 similarly-sized cities or in cities with a similarly sized police force." *Id.* at 431.

5 Defendants are correct that Lawman has not submitted evidence to put the total number of
6 OCC complaints into a more meaningful numerical context. However, a reasonable jury could
7 conclude that the number of actual complaints identified by Lawman amounts to more than a
8 random or isolated problem, especially in light of the fact that individuals arrested for public
9 intoxication generally do not face criminal prosecution after they are released. *See* Cal. Pen. Code
10 § 647(g) ("A person who has been placed in civil protective custody [for violation of section
11 647(f)] shall not thereafter be subject to any criminal prosecution or juvenile court proceeding
12 based on the facts giving rise to this placement" unless one of three exceptions applies). A
13 reasonable jury could thus conclude that the number of OCC complaints is an under-representation
14 of the actual scope of wrongful public intoxication arrests in San Francisco, since people who are
15 wrongfully arrested may not have strong incentive to complain about it.

16 Moreover, the evidence of complaints does not stand alone, and must be viewed in
17 connection with Latko's testimony. Latko, an eleven-year nurse veteran of County Jail 1, testified
18 that "it was not unusual" for him to screen individuals who did not appear to be drunk, and that
19 public intoxication arrests appeared to be based more on a "behavioral thing" than a determination
20 that the individual met the elements of a section 647(f) violation. Latko could not remember a
21 single arrestee receiving a breathalyzer test during more than a decade spent working at the main
22 sobering cell facility.

23 Defendants argue that Latko's testimony does not create a disputed fact regarding the
24 existence of a custom, policy or practice related to section 647(f) arrests, since he is not trained as
25 a police officer and was not present at the time the arrests were made. This argument goes to the
26 weight of Latko's testimony, not its admissibility, and the court may not weigh the evidence at
27 summary judgment. In fact, the Ninth Circuit has reversed a grant of summary judgment where a
28 *Monell* claim was supported by the deposition testimony of a single 911 dispatcher. In *Navarro v.*

1 *Block*, 72 F.3d 712, 714-715 (9th Cir. 1995), the plaintiffs asserted the existence of a policy and
 2 practice of not treating 911 requests for assistance relating to domestic violence as “emergency”
 3 calls. The plaintiffs relied almost exclusively on the testimony of the 911 dispatcher who
 4 answered the call of the decedent victim at issue in the case. The Ninth Circuit found that the
 5 dispatcher’s testimony about the county’s treatment of domestic violence 911 calls satisfied the
 6 plaintiffs’ burden of establishing a genuine issue for trial.

7 As to CCSF’s refusal to implement the OCC’s recommendation that it adopt a testing
 8 policy for section 647(f) arrests, Defendants point out that an individual’s blood alcohol content
 9 would not be determinative of probable cause for violation of section 647(f), since the statute itself
 10 contains no blood alcohol level requirement.¹⁰ This misses the point, for as Lawman argues,
 11 implementing a breathalyzer requirement would ensure that a person with no alcohol in his or her
 12 system would not be arrested for public intoxication and detained without further investigation or
 13 a police report. Numerous officers testified that such a policy would not interfere with law
 14 enforcement duties.

15 In sum, viewing the evidence in the light most favorable to Lawman, the court concludes
 16 that Lawman has established a triable issue as to the existence of a policy, practice or custom
 17 regarding the improper arrest of individuals for violation of section 647(f). Summary judgment on
 18 Lawman’s *Monell* claim is therefore denied.

19 **5. ADA Claim**

20 Lawman’s fourth claim is that CCSF violated the ADA. Title II of the ADA provides that
 21 “no qualified individual with a disability shall, by reason of such disability, be excluded from
 22 participation in or be denied the benefits of the services, programs, or activities of a public entity,
 23 or be subjected to discrimination by any such entity.” 42 U.S.C. § 12132. “Discrimination
 24 includes a failure to reasonably accommodate a person’s disability.” *Sheehan v. City & Cty. of*

25
 26 ¹⁰ Defendants also argue that a breathalyzer would be ineffective because intoxication can be the
 27 result of alcohol, drugs, or a combination thereof. Cal. Penal Code § 647(f). However, the Public
 28 Intoxication Report form explicitly states that it is “not to be used for drug intoxication arrests.”
 (Public Intoxication Report.) Therefore, a reasonable jury could conclude that implementing a
 breathalyzer policy could be useful in reducing wrongful arrests for public drunkenness.

1 *San Francisco*, 743 F.3d 1211, 1231 (9th Cir. 2014), *reversed in part on other grounds*, 135 S. Ct.
2 1765 (2015).

3 The Ninth Circuit has held that the ADA applies to arrests. *Sheehan*, 743 F.3d at 1232. In
4 *Sheehan*, the Ninth Circuit recognized two types of ADA claims applicable to arrests: 1) wrongful
5 arrest, “where police wrongly arrest someone with a disability because they misperceive the
6 effects of that disability as criminal activity,” and 2) reasonable accommodation, where police
7 “fail to reasonably accommodate the person's disability in the course of investigation or arrest,
8 causing the person to suffer greater injury or indignity in that process than other arrestees.” *Id.*
9 Lawman alleges that both theories apply here. Am. Compl. ¶ 55.

10 **a. Wrongful Arrest**

11 To prevail on a theory of wrongful arrest under the ADA, Lawman must prove that 1) he
12 was disabled; 2) the officers knew or should have known he was disabled; and 3) the officers
13 arrested him because of legal conduct related to his disability. *Orr v. California Highway Patrol*,
14 No. CIV. 2:14-585 WBS, 2015 WL 848553, at *17 (E.D. Cal. Feb. 26, 2015) (citations omitted);
15 *see also Lewis v. Truitt*, 960 F. Supp. 175, 178 (S.D. Ind. 1997).

16 In their motion, CCSF argues that there is no evidence that Lawman was disabled on the
17 date in question. On reply, they concede that if a jury believes Dr. Victor’s opinion that Lawman
18 has bipolar disorder, it could conclude that Lawman was disabled on December 31, 2011.
19 Therefore, there is a dispute of material fact regarding the first element of Lawman’s ADA claim.

20 CCSF contends that Lawman has not shown that the arresting officers knew or should have
21 known of his disability when they arrested him.¹¹ It asserts that the officers’ lack of knowledge of
22

23 ¹¹ Defendants also contend that Lawman cannot pursue a theory of wrongful arrest under the ADA
24 because he fails to demonstrate a prima facie case of disparate impact, arguing that he must show
25 1) a facially neutral policy that 2) has a significantly adverse or disproportionate impact on a group
26 of persons protected by the ADA. Mot. at 16. Defendants offer no support for their assertion that
27 a plaintiff must demonstrate a disparate impact when the claim is based on an allegation that the
28 police wrongly arrested an individual with a disability because they misperceived the effects of the
disability as criminal activity. Defendants cite *Tsombanidis v. West Haven Fire Department*, 352
F.3d 565, 575 (2nd Cir. 2003), but it is inapposite. *Tsombanidis* involved a challenge to a city’s
fire code, where the plaintiffs alleged that the regulations adversely impacted individuals who
sought to live in a group home for persons in recovery from alcohol addiction. 352 F.3d at 575-
76. It did not involve an ADA wrongful arrest claim.

1 Lawman’s bipolar disorder distinguishes this case from *Lum v. County of San Joaquin*, No. CIV.
2 S-10-1807 LKK/DAD, 2012 WL 1027667, at *9-10 (E.D. Cal. March 23, 2012) (“*Lum II*”). In
3 *Lum II*, the defendant officers arrested an individual who had been diagnosed with bipolar disorder
4 for violating section 647(f), even though one of the arresting officers thought he was having a
5 mental health episode and there was evidence that an officer told a witness “we think he’s off his
6 meds.” *Id.* at *1. Moreover, the arrestee informed one of the officers that he was under the care of
7 a doctor for his bipolar condition. *Id.* at *2. Here, CCSF states that there is no evidence that the
8 arresting officers knew that Lawman was suffering from a disability, or that “it was obvious” that
9 Lawman was suffering from a disability.

10 The record contains few facts about what the arresting officers observed about Lawman’s
11 appearance, conduct and demeanor when they arrested him. Gordon and Minioza arrived at the
12 Four Seasons in response to a call for assistance in removing Lawman from the premises. When
13 they arrived, Flores told them that Lawman, who was casually dressed and “pretty clean-cut,” had
14 no business at the Four Seasons and was refusing to leave. According to witnesses, Lawman’s
15 attitude toward the officers was rude and belligerent. In his Public Intoxication Report, Gordon
16 noted that Lawman “could not answer [his] questions.” Gordon also stated that Lawman “was
17 unable to care for himself as a result of his intoxication,” which echoes the section 647(f)
18 requirement that an individual be “in a condition that he or she is unable to exercise care for his or
19 her own safety or the safety of others.” Cal. Pen. Code § 647(f). The remaining details in
20 Gordon’s report—drooping eyelids, slow and slurred speech, and odor of alcohol—are disputed.
21 After his arrest, Lawman was steady on his feet as he walked to the police van a few hundred feet
22 away from the Four Seasons.

23 Although it is an extremely close question, the court concludes that a reasonable jury could
24 determine that the arresting officers knew that Lawman was not intoxicated, and should have
25 known that Lawman’s strange behavior was caused by a mental disability. Lawman presented
26 evidence that SFPD officers are trained “to recognize behavioral indicators that may be generally
27 associated with people affected by mental illness,” and learn that people with psychiatric
28 disabilities “may be acting in a ‘bizarre’ manner simply because they are not taking their

prescription medication.” May Decl. Ex. 15 at CCSF_LAWMAN 001015, 000288. Although many of Gordon’s observations in the Public Intoxication Report are disputed, his observations that Lawman could not answer his questions and was unable to care for himself are not in dispute. Although the record does not contain the substance of all of the questions that Lawman was unable to answer, Flores recalled that an officer asked Lawman why he was on the hotel premises. Viewing the evidence in the light most favorable to Lawman, and drawing all inferences in his favor, a reasonable juror could conclude that Gordon likely asked Lawman routine questions, similar to the one overheard by Flores. A reasonable juror could also conclude that the officers, who had been trained in recognizing behavioral indicators of mental illness, should have known that Lawman was displaying symptoms of a disability. This is based on his inability to answer routine questions, Gordon’s conclusion that Lawman “was unable to care for himself,” and evidence that Lawman was not intoxicated, and that therefore his strange behavior was not caused by drunkenness. In sum, a reasonable juror could determine that the officers should have known that Lawman was disabled, and that they arrested him for legal conduct related to his disability. Accordingly, the court denies summary judgment as to Lawman’s wrongful arrest theory of ADA liability.

b. Reasonable Accommodation

With respect to Lawman’s claim that CCSF failed to reasonably accommodate his disability, CCSF argues that this claim fails because it had no notice of Lawman’s disability and Lawman never identified a proposed accommodation that CCSF then denied.

“Before a public entity can be required under the ADA to provide a disabled individual an auxiliary aid or service, a public entity must have knowledge of the individual’s disability and the individual’s need for an accommodation.” *Robertson v. Las Animas Cty. Sheriff’s Dep’t*, 500 F.3d 1185, 1196 (9th Cir. 2007). “[T]he entity must have knowledge that the individual is disabled, either because that disability is obvious or because the individual (or someone else) has informed the entity of the disability.” *Id.* Here, as discussed above, taking the evidence in the light most favorable to Lawman, a reasonable jury could conclude that the arresting officers should have known that Lawman was disabled.

Lawman alleges that CCSF failed to accommodate him by providing immediate medical care, including mental health services. The problem with Lawman's position is that the facts do not demonstrate that he asked for, or otherwise appeared to require immediate medical care.¹² While a reasonable jury could conclude that Lawman was wrongfully arrested for exhibiting symptoms related to his disability, there is little to suggest that Defendants should have known that Lawman was in distress and required immediate medical attention. Lawman was triaged by Latko at the jail, and Latko determined he was not in immediate need of medical care. The jail cell observation record, which Lawman does not challenge, shows that jail personnel observed him four times per hour thereafter, with no indication of unusual behavior prior to his release. His cell mate's references to Lawman acting "loopy and restless" and having peanut butter smeared on his clothing are too vague to support an inference that Lawman needed immediate medical care. Therefore, a reasonable juror could not conclude on this record that CCSF was on notice of Lawman's need for reasonable accommodation in the form of medical care.¹³ The court grants summary judgment on Lawman's ADA claim based on a failure to accommodate.

6. California Government Code section 845.6

Lawman's fifth cause of action is for violation of California Government Code section

¹² It is not clear whether an individual asserting a failure to accommodate in connection with an arrest must explicitly request an accommodation. In *Sheehan*, the Ninth Circuit analyzed a failure to accommodate claim based on an arrest where the plaintiff did not specifically request an accommodation of her disability. It was undisputed that the responding officers knew that Sheehan had a mental disability. Without addressing this precise issue, the Ninth Circuit concluded that "because the reasonableness of an accommodation is ordinarily a question of fact, . . . [the defendant] [was] not entitled to judgment as a matter of law" on the claim. 743 F.3d at 1233. Therefore, the court must infer that under certain circumstances, a plaintiff may not need to request an accommodation in order to bring a denial of accommodation claim involving an arrest, at least where it is clear to the officers that the person is disabled.

¹³ To the extent Lawman contends that the medical treatment he received was inadequate, such a claim is not actionable under the ADA, because "[t]he ADA prohibits discrimination because of disability, not inadequate treatment for disability." *Simmons v. Navajo Cty.*, 609 F.3d 1011, 1022 (9th Cir. 2010). CCSF cannot have violated the ADA by failing to attend to Lawman's medical needs, because "[t]he ADA does not create a remedy for medical malpractice." *Id.* (quoting *Bryant v. Madigan*, 84 F.3d 246, 249 (7th Cir. 1996) ("[T]he Act would not be violated by a prison's simply failing to attend to the medical needs of its disabled prisoners.")).

845.6. Section 845.6 provides that a public employee may be liable for failing to summon medical assistance under certain circumstances:

Neither a public entity nor a public employee is liable for injury proximately caused by the failure of the employee to furnish or obtain medical care for a prisoner in his custody; but, except as otherwise provided by Sections 855.8 and 856, a public employee, and the public entity where the employee is acting within the scope of his employment, is liable if the employee knows or has reason to know that the prisoner is in need of immediate medical care and he fails to take reasonable action to summon such medical care.¹⁴

To state a claim under section 845.6, “a prisoner must establish three elements: (1) the public employee knew or had reason to know of the need (2) for immediate medical care, and (3) failed to reasonably summon such care.” *M. H. v. Cty. of Alameda*, 62 F. Supp. 3d 1049, 1099 (N.D. Cal. 2014) (citation omitted). “In this manner, section 845.6 imposes a statutory duty to summon medical care.” *Id.* (citation omitted). By its own terms, section 845.6 only applies to prisoners in custody. For this reason, Lawman concedes that this claim may only be brought against Kneuker, who transported Lawman to the jail after he was taken into custody, and Sheriff’s Department Deputies Pene, Palencia, Brown, Rapicavoli, and O’Shea, who were on duty at County Jail 1 on the date in question.¹⁵ Lawman asserts that these Defendants knew or had reason to know that Lawman was in immediate need of medical care and failed to take reasonable action to summon such care. Am. Compl. ¶ 59.

Defendants argue that Lawman’s section 845.6 claim fails because there was no evidence that he needed immediate medical care, and no evidence that they had reason to know that Lawman was in need of immediate medical care. They also argue that they provided medical care

¹⁴ “[S]ection 855.8 immunizes the failure to diagnose or to prescribe treatment, and section 856 immunizes the determination whether to confine, for mental illness or addition.” *Johnson v. Cty. of Los Angeles*, 143 Cal. App. 3d 298, 317 (1983) (emphasis removed).

¹⁵ Because Lawman was not a “prisoner” until he entered the jail, Defendants Gordon and Minioza would not be subject to liability under section 845.6. See Cal. Gov’t Code § 844 (“For the purposes of this chapter, a lawfully arrested person . . . becomes a prisoner, as a matter of law, upon his or her initial entry into a prison, jail, or penal or correctional facility, pursuant to penal processes.”). The court notes that the record is unclear as to whether Kneuker was present when Lawman entered the jail and became a “prisoner” for purposes of section 845.6, thus subjecting Kneuker to liability under this provision. However, Defendants appear to concede in their reply brief that Lawman has properly asserted his section 845.6 claim against Kneuker. See Reply at 11.

1 to Lawman at the jail in the form of the triage by Latko.

2 As to Kneuker, the only record evidence of his involvement with the arrest and detention
3 of Lawman is that he transported Lawman to the jail following his arrest for public intoxication.
4 There is no evidence that Kneuker had any knowledge at all about Lawman's physical or mental
5 condition at the time of transport. Based on the record evidence, Kneuker can reasonably be
6 imputed with only the knowledge of the reason for Lawman's arrest, i.e. public intoxication. This
7 is insufficient to create a dispute of material fact about whether Kneuker knew or had reason to
8 know of Lawman's purported need for immediate medical care.

9 As to the Sheriff's Department Deputies, their knowledge of Lawman's behavior is limited
10 to the events at the jail, since there is no evidence that they were aware of Lawman's actions or the
11 arresting officers' observations prior to Lawman's arrest. These facts are set forth above in the
12 discussion of Lawman's ADA claim for failure to provide a reasonable accommodation in the
13 form of medical care. On these facts, the court concludes that no reasonable jury could find that
14 the SFSD Deputies knew or had reason to know that Lawman needed immediate medical care.

15 Accordingly, the court grants summary judgment on Lawman's section 845.6 claim.

16 **7. Bane Act, California Civil Code section 52.1**

17 Defendants next move for summary judgment on Lawman's sixth claim for violation of the
18 Bane Act, California Civil Code section 52.1. The Bane Act authorizes an action for damages,
19 injunctive relief, and other "appropriate equitable relief" against a person or persons who
20 "interferes by threats, intimidation, or coercion, or attempts to interfere by threats, intimidation, or
21 coercion, with the exercise or enjoyment by any individual or individuals of rights secured" by
22 federal or state law and the United States or California constitutions. Cal. Civ. Code § 52.1(a),
23 (b). "The essence of a Bane Act claim is that the defendant, by the specified improper means (i.e.,
24 'threats, intimidation or coercion'), tried to or did prevent the plaintiff from doing something he or
25 she had the right to do under the law or to force the plaintiff to do something he or she had the
26 right to do under the law or to force the plaintiff to do something that he or she was not required to
27 do under the law." *Austin B. v. Escondido Union School Dist.*, 149 Cal. App. 4th 860, 883 (2007)
28 (citation omitted).

1 In order to prevail on his Bane Act claim, Lawman must show that 1) Defendants
2 interfered with his constitutional or statutory rights; and (2) that interference was accompanied by
3 actual or attempted threats, intimidation, or coercion. *Campbell v. Feld Entm't, Inc.*, 75 F. Supp.
4 3d 1193, 1211 (N.D. Cal. 2014) (citations omitted). "Only if [Lawman] can first establish that
5 Defendants violated a constitutional or statutory right can the Court consider whether such
6 interference was the product of threats, intimidation, or coercion." *Id.*

7 At the hearing, Lawman clarified that his Bane Act claim is based solely upon the violation
8 of his Fourth Amendment right to be furnished medical care, and that the violation of that right
9 was accompanied by coercion, i.e. his incarceration in the county jail. *See* Opp'n at 25-26; Dec.
10 17, 2015 Hr'g Tr. at 41. He asserts that his incarceration provides the requisite coercion to
11 support his Bane Act claim. Lawman brings this claim only against Defendants Gordon, Minioza,
12 and Kneuker. As discussed below, the court denies Lawman's motion for leave to amend the
13 complaint to add a Fourth Amendment failure to render medical care claim, on the ground that
14 such a claim would be futile. Accordingly, since Lawman cannot establish that Defendants
15 violated his right to be furnished medical care under the Fourth Amendment, his Bane Act lacks a
16 predicate for liability. Therefore, summary judgment is granted as to Lawman's Bane Act claim.

17 8. Negligence

18 Lawman's seventh and final claim is for negligence.¹⁶ He alleges that the individual

19
20 ¹⁶ Lawman alleges that CCSF is vicariously liable for the acts and omissions of its employees
21 acting in the course and scope of their employment with CCSF. Am. Compl. ¶ 72 (citing Cal.
Gov't Code § 815.2). Section 815.2 provides

22 (a) A public entity is liable for injury proximately caused by an act
23 or omission of an employee of the public entity within the scope of
24 his employment if the act or omission would, apart from this section,
have given rise to a cause of action against that employee or his
personal representative.

25 (b) Except as otherwise provided by statute, a public entity is not
26 liable for an injury resulting from an act or omission of an employee
of the public entity where the employee is immune from liability.

27 Cal. Gov't Code § 815.2. Pursuant to this provision, CCSF "is liable for acts and omissions of its
28 employees under the doctrine of respondeat superior to the same extent as a private employer.
Under subdivision (b), [CCSF] is immune from liability if, and only if, [the employee] is
immune." *Scott v. Cty. of Los Angeles*, 27 Cal. App. 4th 125, 140 (1994).

defendants breached their duties to use reasonable care to avoid injury to him, proximately causing him to suffer catastrophic injuries. Am. Compl. ¶¶ 70, 71. “Under California law, ‘[t]he elements of negligence are: (1) defendant’s obligation to conform to a certain standard of conduct for the protection of others against unreasonable risks (duty); (2) failure to conform to that standard (breach of duty); (3) a reasonably close connection between the defendant’s conduct and resulting injuries (proximate cause); and (4) actual loss (damages).’” *Corales v. Bennett*, 567 F.3d 554, 572 (9th Cir. 2009) (quoting *McGarry v. Sax*, 158 Cal. App. 4th 983, 994 (2008)).

Defendants argue that they are immune from liability for negligence pursuant to two California statutory immunities. They also argue that Lawman cannot establish a duty of care or causation.

a. Statutory Immunities

Defendants first argue that California Penal Code section 847(b)(1) immunizes the SFPD Defendants from liability related to Lawman’s arrest because they had reasonable cause to believe that the arrest was lawful. As discussed above, given the factual disputes about whether the arrest for public intoxication was supported by probable cause, summary judgment based on section 847(b)(1) immunity is inappropriate.

Defendants next argue that the Sheriff’s Department defendants are immune from liability under California Government Code section 846. Section 846 provides in relevant part that “[n]either a public entity nor a public employee is liable for injury caused by . . . the failure to retain an arrested person in custody. Cal. Gov’t Code § 846. “Courts have routinely applied Section 846 immunity where police officers release someone who then goes on to harm a third party.” *Lum v. Cty. of San Joaquin*, 756 F. Supp. 2d 1243, 1256 (E.D. Cal. 2010) (“*Lum I*”) (citing *Santa Barbara v. Superior Court*, 15 Cal.App.3d 751 (1971)) (denying motion to dismiss negligence claim; concluding, *inter alia*, section 846 immunity inapplicable). In *Lum I*, the court declined to extend Section 846 immunity to public entities and police officers who had released an arrestee with mental health problems who subsequently died by accidental drowning. Instead, the *Lum I* decision finds that section 846 immunity is confined to situations where a released prisoner subsequently harms a third person:

The purpose of the statute is to prevent police from over-using their arrest power merely to avoid civil liability for harm that results from failure to arrest and detain. “[The power to make an arrest] is strictly limited and the abuse of such power can result in civil liability. It would be contrary to public policy, simultaneously to permit the imposition of civil liability for a failure to exercise the power. Hence the [§ 846] immunity is a logical adjunct to the public policy.” *Lehto v. City of Oxnard*, 171 Cal.App.3d 285, 217 Cal.Rptr. 450 (2d District, 1985). The court concludes that the purpose of the statute is *to provide immunity to the public entity or officer from liability for any wrongdoing by a released prisoner that harms a third party.*

Id. at 1256–57 (emphasis added). This court agrees with Judge Karlton’s reasoning in *Lum I*. Accordingly, the court finds that section 846 immunity does not apply in these circumstances.

b. Whether Defendants Owed Lawman a Duty of Care

Defendants next argue that the arresting officers and Sheriff’s Department Deputies did not owe a duty of care to Lawman, and the circumstances did not establish a special relationship between Lawman and Defendants that otherwise created such a duty.

The existence of a duty of care is a question of law. *Ballard v. Uribe*, 41 Cal. 3d 564, 572 n.6. Lawman argues that Defendants, as the arresting officers and jailers, owed him a duty of care arising from the special relationship with him. Lawman cites *Giraldo v. California Department of Corrections*, 168 Cal. App. 4th 231, 252-53, in which the court held that “there is a special relationship between jailer and prisoner which imposes a duty of care on the jailer to the prisoner.” The court in *Giraldo* emphasized that “the most important consideration ‘in establishing duty is foreseeability.’” *Id.* at 250.¹⁷

Lawman also relies on *Lum I*, in which the court held that “[o]fficers and jailers have a duty to act with reasonable care toward those in their custody.” 756 F. Supp. 2d at 1255. In *Lum I*, the decedent was arrested pursuant to section 647(f). At the time of his arrest, one of the

¹⁷ In *Giraldo*, the plaintiff was a male-to-female transgender person who was incarcerated with male inmates. 169 Cal. App. 4th at 238. She was repeatedly beaten and raped by her male cellmate, despite her complaints to prison officials and requests to be transferred to a different cell. *Id.* at 239. The court found that the jailer owed the plaintiff a duty of care in that instance due to the foreseeability of harm, stating that “[i]t is manifestly foreseeable that an inmate may be at risk of harm, as [recently enacted legislation] show[s], recognizing the serious problem presented by sexual abuse in the prison environment.” *Id.* at 250. It also noted the vulnerability and dependence of prisoners, and the protective nature of the relationship between jailers and prisoners. *Id.*

1 arresting officers commented that the decedent, who was under psychiatric care for bipolar
2 disorder, was “probably just off his meds.” *Id.* at 1246. When he was arrested, the decedent “had
3 a laceration on his foot, difficulty walking, vomit on his shirt, and was behaving strangely.” *Id.*
4 Although no alcohol was found in the decedent’s system, the arresting officers did not take any
5 action to evaluate his physical or mental state. *Id.* They booked the decedent into the county jail
6 on a “‘kickout’ charge, meaning that he would be released from jail six hours later.” *Id.* At his
7 booking, the decedent informed an officer of his bipolar disorder and that he took medication, and
8 jail staff later observed the decedent having hallucinations, including “attempting to open
9 imaginary doors and speaking to himself.” *Id.* The decedent also suffered a seizure while in jail.
10 *Id.* at 1247. The police officers released the decedent about six hours after his arrest, without ever
11 having obtained medical treatment for him or a medical or psychological evaluation of him. His
12 body was found in the San Joaquin River several days later; the cause of death was accidental
13 drowning. *Id.*

14 The court in *Lum I* carefully analyzed the reasoning in *Giraldo* and concluded that the
15 jailer-prisoner special relationship is “analogous to law enforcement officers and arrestees,” and
16 held that “it is reasonably foreseeable that an arrestee who is in need of medical attention would be
17 at risk in a custodial environment or upon release into a situation made dangerous by his medical
18 condition, or without first having received proper medical attention.” *Id.* at 1255. Accordingly,
19 the court concluded that the defendants owed the decedent a duty of care.

20 In *Lum I*, there was ample evidence that the decedent was experiencing a mental health
21 emergency during his arrest and incarceration that required medical attention. In this case, as
22 discussed above, a reasonable jury could conclude that the arresting officers should have known
23 that Lawman had a disability. However, having a mental disability is not equivalent to having a
24 mental disability that requires immediate medical attention. Unlike *Lum I*, there are no facts to
25 indicate that Lawman was in medical crisis at the time of his arrest that created a foreseeable risk
26 of harm upon his release. Moreover, Lawman was triaged at the jail, and he reported that he had
27 no urgent medical condition. Lawman was observed several times per hour by nurses and
28 deputies and his observation record contains no entries of unusual behavior. While the decedent in

Lum I was observed hallucinating in his holding cell and suffered from a seizure, here, the only evidence of Lawman's behavior at the jail is M. M.'s observation that Lawman "had peanut butter smeared on him" and "was acting loopy and restless." Based on these facts, and the absence of evidence that Lawman was actually experiencing a mental health emergency during his arrest and detention, the court cannot conclude that it was reasonably foreseeable that Lawman would be at risk "upon release into a situation made dangerous by his medical condition, or without first having received proper medical attention." *Id.* at 1255. Accordingly, the court finds that Defendants did not owe Lawman a duty of care. Therefore, summary judgment is granted as to Lawman's negligence claim.¹⁸

9. Punitive Damages

Lawman seeks punitive damages against Defendants Gordon, Minioza, and Kneuker as to his Fourth Amendment, ADA, section 845.6, Bane Act, and false arrest/false imprisonment claims. Hr'g Tr. at 58-59. Defendants argue that there is no evidence from which a reasonable jury could infer "bad intent." Mot. at 25.

A jury may assess punitive damages under Section 1983 when a defendant's conduct involves "reckless or callous indifference to the federally protected rights of others" without regard to actual intent or malice. *Smith v. Wade*, 461 F.2d 30, 56 (1983). Under California law, punitive damages are available if a plaintiff proves "by clear and convincing evidence that the defendant has been guilty of oppression, fraud, or malice." Cal. Civ. Code § 3294(a). Malice "includes the willful and conscious disregard of the rights or safety of others." Cal. Civ. Code § 3294(c)(1).

As discussed above, the court grants summary judgment on all claims against Kneuker, and grants summary judgment on Lawman's ADA accommodation claim, section 845.6 claim, and Bane Act claim. Given that Lawman has raised triable issues as to the legality of his arrest, the court finds that the evidence is sufficient to create a triable issue as whether Gordon and Minioza's conduct during Lawman's arrest meets the requisite federal and state standards for an

¹⁸ Because the court concludes that Defendants did not owe Lawman a duty of care, it need not reach Defendants' arguments regarding causation.

award of punitive damages. Summary judgment on punitive damages as to Gordon and Minioza is therefore denied.

III. MOTION TO AMEND

As noted, Lawman seeks leave to amend his complaint to allege a claim for failure to render medical care under the Fourth Amendment.

A. Legal Standard

Under Federal Rule of Civil Procedure 15(a), leave to amend should be granted as a matter of course, at least until the defendant files a responsive pleading. After that point, leave to amend should be granted unless amendment would cause prejudice to the opposing party, is sought in bad faith, is futile, or creates undue delay. Fed. R. Civ. P. 15(a). Rule 15(a) provides that the court should “freely give leave when justice so requires.” Fed. R. Civ. P. 15(a). “This policy is to be applied with extreme liberality.” *Eminence Capital, LLC v. Aspeon, Inc.*, 316 F.3d 1048, 1051 (9th Cir. 2003) (quotation omitted). In the absence of an “apparent reason,” such as undue delay, bad faith, dilatory motive, prejudice to defendants, futility of the amendments, or repeated failure to cure deficiencies in the complaint by prior amendment, it is an abuse of discretion for a district court to refuse to grant leave to amend a complaint. *Foman v. Davis*, 371 U.S. 178, 182 (1962); *Lockheed Martin Corp. v. Network Solutions, Inc.*, 194 F.3d 980, 986 (9th Cir.1999). These factors do not “merit equal weight,” and “it is the consideration of prejudice to the opposing party that carries the greatest weight.” *Eminence Capital*, 316 F.3d at 1052. “Granting leave to amend does not necessarily mean that the underlying allegations ultimately have merit.” *FlatWorld Interactives LLC v. Apple Inc.*, 12-cv-01956-WHO, 2013 WL 6406437, at *3 (N.D. Cal. Dec. 6, 2013). “Rather, ‘[a]bsent prejudice, or a strong showing of any of the remaining [] factors, there exists a *presumption* under Rule 15(a) in favor of granting leave to amend.’” *Id.* (quoting *Eminence Capital*, 316 F.3d at 1052).

B. Analysis

Lawman moves pursuant to Rule 15(a)(2) to amend the complaint to add a claim for failure to render medical care under the Fourth Amendment, relying on *Tatum v. City & County of San Francisco*, 441 F.3d 1090, 1099 (9th Cir. 2006). Defendants object to the amendment, arguing

1 that the amendment is futile and prejudicial, and that Lawman unduly delayed in seeking leave to
2 amend.

3 The Supreme Court has held that the Fourteenth Amendment requires the police “to
4 provide medical care to persons . . . who have been injured while being apprehended by the
5 police.” *City of Revere v. Mass. Gen. Hosp.*, 463 U.S. 239, 244 (1983). In *Tatum*, the Ninth
6 Circuit considered claims of unlawful arrest and excessive force brought by the mother of a
7 suspect who died in police custody shortly after his arrest. A police officer asked the suspect,
8 whom the officer suspected of being intoxicated or under the influence of a controlled substance,
9 to present identification and to stop kicking a police station door. *Id.* at 1093. The suspect refused
10 to comply and attempted to evade the officer’s attempts to place him in handcuffs. After the
11 officer applied a bar arm control hold to force the suspect to the ground, several officers arrived to
12 assist and succeeded in handcuffing the suspect. *Id.* The suspect lay on his stomach for about a
13 minute after he was handcuffed, and then the officers positioned him on his side. About two
14 minutes later, one of the officers requested an ambulance after noticing that the suspect’s
15 breathing was heavy and his eyes were bulging, and the suspect’s breathing became shallow. The
16 officer sent a message asking that his request for an ambulance be given priority and the officers
17 continued to monitor the suspect while they waited for the ambulance. Upon their arrival
18 approximately ten minutes later, the paramedics observed that the suspect was on his back and
19 pronounced the suspect dead at the scene. The coroner determined that he had died of cocaine
20 toxicity. *Id.*

21 The decedent’s mother argued that certain aspects of his detention after his arrest
22 constituted excessive force, including the officers’ positioning the decedent on his stomach, failure
23 to notice that he had rolled onto his back, and failure to perform CPR. *Id.* at 1097. The Ninth
24 Circuit discussed the Supreme Court’s holding in *City of Revere* in light of the Court’s subsequent
25 decision in *Graham v. Connor*, 490 U.S. 386, 395 (1989), that claims of excessive force by law
26 enforcement officers should be analyzed under the Fourth Amendment, and concluded that claims
27 of deficient post-arrest medical care must be analyzed under the Fourth Amendment. *Tatum*, 441
28 F. 3d at 1098-99; see *Estate of Cornejo v. City of Los Angeles*, 618 Fed. Appx. 917, 920 (9th Cir.

2015) (“suspects have a Fourth Amendment right to ‘objectively reasonable post-arrest [medical] care’ until the end of the seizure.” (quoting *Tatum*, 441 F. 3d at 1099)). The Ninth Circuit affirmed the standard for “objectively reasonable post-arrest care” set forth in *Maddox v. City of Los Angeles*, 792 F.2d 1408, 1415 (9th Cir. 1986), that “police must seek necessary medical attention by promptly summoning help or taking the injured arrestee to a hospital.” *Estate of Cornejo*, 618 Fed. Appx. at 920. The court in *Tatum* ultimately concluded that “[a]bsent evidence . . . that the officers ignored [the decedent’s] deteriorating medical condition . . . it was objectively reasonable for the officers to monitor [his] condition in the manner they did until an ambulance arrived,” and that “it was objectively reasonable for [the officers] to request an ambulance for the decedent, rather than performing CPR themselves.” 441 F.3d at 1098, 1099 (“Here, the officers promptly requested medical assistance, and the Constitution required them to do no more.”).

Here, Lawman does not allege that the arresting officers used excessive force, and there is no evidence or allegation that Lawman was “injured while being apprehended by the police.” See *Tatum*, 441 F.3d at 1099 (quoting *City of Revere*, 463 U.S. at 244); see also *Maddox*, 792 F.2d at 1415 (officers “must seek the necessary medical attention for a detainee when he or she has been injured while being apprehended”). Therefore, it is not clear whether a Fourth Amendment claim based on the arresting officers’ failure to render medical care under *Tatum* is sustainable on these facts. Further, unlike the suspect in *Tatum*, who began to experience difficulty breathing after being handcuffed, there is no evidence or allegation that Lawman’s medical condition began to deteriorate during the course of his arrest by Gordon and Minioza. It is unclear whether Lawman asserts this claim for the period following his arrest. To the extent Lawman argues that Defendants should have rendered medical assistance during his transportation to County Jail 1, or during his detention in the sobering cell, it is unlikely that the Fourth Amendment would apply to post-arrest conduct.¹⁹ In any event, the evidence does not support such a claim, as described

¹⁹ The court notes that Lawman has conceded his Fourteenth Amendment deliberate indifference claim. See *Simmons*, 609 F.3d at 1017-18 (“the Fourteenth Amendment’s Due Process Clause . . . applies to pretrial detainees ‘We have long analyzed claims that correction facility officials violated pretrial detainees’ constitutional rights by failing to address their medical needs . . . under a ‘deliberate indifference’ standard.’” (citations omitted)).

1 above. Therefore, since a claim for failure to render medical assistance under the Fourth
2 Amendment would be futile, the court denies Lawman leave to amend his complaint to plead such
3 a claim.

4 **IV. CONCLUSION**

5 For the foregoing reasons, Defendants' motion for summary judgment is granted in part
6 and denied in part. Summary judgment is granted as to Lawman's ADA accommodation claim,
7 California Government Code 845.6 claim, Bane Act Claim, and negligence claim. The remaining
8 defendants are CCSF, Gordon and Minioza. Plaintiff's motion to amend is denied.

9
10 **IT IS SO ORDERED.**

11 Dated: February 5, 2015

